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No. 10-389

In the
# Supreme Court of the United States

JOSE GUEVARA,

*Petitioner,*

v.

REPUBLICA DEL PERU, AND
MINISTERIO DEL INTERIOR DEL PERU,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.*

## PETITIONER'S REPLY BRIEF

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## ARGUMENT

Respondents' brief in opposition to the Petition underscores the need for review by this Court. First, Respondents simply ignore the clear split among the circuits as to what constitutes a "direct effect" sufficient to vest a court with jurisdiction under the "commercial activity" exception to the Foreign Sovereign Immunities Act. Although this Court addressed the question presented in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1993), it did not settle the issue. Indeed, as the Petition makes clear, the circuits split almost immediately following *Weltover*.

Second, contrary to Respondents' assertions, the Eleventh Circuit squarely addressed whether Respondents' actions satisfied the jurisdictional nexus of the commercial activity exception's third clause, *i.e.*, whether Respondents' conduct caused a "direct effect" in the United States. And, critically, the Eleventh Circuit did so at Respondents' request. Thus, Petitioner never waived the nexus issue before the Eleventh Circuit. Indeed, Respondents repeatedly concede as much throughout their brief in opposition.

Third, Respondents wrongly argue that the Eleventh Circuit's decision here did not deepen the split among the circuits. While the Eleventh Circuit may not have referred directly to the Second Circuit's "legally significant act" test, the court's reasoning clearly indicates that the Eleventh Circuit firmly sits in the Second Circuit's camp. This case therefore presents an ideal vehicle for the Court to resolve the circuit split.

Fourth, public policy favors requiring Respondents to honor their reward offer. As the Eleventh Circuit made clear in *Guevara I*, Respondents' refusal to pay the reward threatened to undermine the viability of similar reward programs sponsored by other nations like the United States. While the FBI supported Petitioner's claim to the reward, the Department of State opposed payment. This gap between law enforcement and diplomatic priorities further confirms the importance of the question presented.

1. Respondents ignore the existence of a clear conflict among the circuits interpreting the commercial activity exception to the Foreign Sovereign Immunities Act. Respondents make the bold assertion that the circuit split interpreting the FSIA's jurisdictional nexus requirement is "illusory," Resp.[1] at ii, and dismiss the Petition as nothing more than "an academic discussion of the 'legally significant act' test in the courts," *id.* at 13-14. As with Respondents' recitation of the "facts,"[2] nothing could be further from the truth.

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[1] "Resp. at ___" refers to Respondents' Brief in Opposition to Petition for Writ of Certiorari. "Pet. at ___" refers to the Petition for Writ of Certiorari.

[2] The lion's share of Respondents' brief is devoted to a skewed, if not outright, misrepresentation of the facts presented to the district court. The district court's order granting Petitioner summary judgment was entered at DE-230. The majority of Respondents' so-called "evidence" was presented *after* the district court's ruling and therefore did not merit a response from Petitioner. In any event, Petitioner challenged Respondents' "evidence" at the district court level, because Respondents' late-filed "evidence" lacked foundation, authenticity, and constituted inadmissible hearsay. *See* DE-291, 301, 319.

The circuit courts of appeal have acknowledged the split on numerous occasions. The Sixth Circuit noted that "the circuits have framed the inquiry differently" in determining when a "direct effect" is sufficiently present to invoke a court's jurisdiction. *See Am. Telecom Co., L.L.C. v. Republic of Lebanon*, 501 F.3d 534, 540 (6th Cir. 2007) (recognizing that "the Second and Ninth Circuits require a 'legally significant act' in order to find a direct effect, the Eighth and Tenth Circuits find the legally-significant-act test helpful but not required, and the Fifth and Sixth Circuits have renounced any legally-significant-act test") (internal citation omitted).

Similarly, the Tenth Circuit recently highlighted the deep division among the circuits interpreting the commercial activity exception's "direct effect" clause. *See Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007) (noting that the Second and Ninth Circuits have adopted the "legally significant acts" test, while the Fifth and Sixth Circuits have expressly rejected the test). Even among the circuits that have adopted the "legally significant act" test, there are divisions as to whether the foreign sovereign's legally significant act must occur within – or without – the United States. *See id.*

Legal scholars have also identified the "confusion and controversy" ignited among the circuits following this Court's decision in *Weltover*. *See* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat it Like One*, 5 CHI. J. INT'L L. 675, 687 (2005); *see also* David E. Gohlke, *Clearing the Air or Muddying the Waters? Defining "A Direct Effect in the United States" Under the Foreign Sovereign*

*Immunities Act After Republic of Argentina v. Weltover*, 18 HOUS. J. INT'L L. 261, 285 (1995) (stating that the "[a]pplication of the direct effects clause of the commercial activities exception has been *varied and unpredictable*, and the *unworkability* of the 'immediate consequences' test was implicated by at least one court") (emphasis added).

This case would permit the Court to resolve the split among the circuits and create a uniform jurisdictional test to guide the lower courts on an issue which this Court has characterized as the "most significant of the FSIA's exceptions." *Weltover*, 504 U.S. at 611.

2. Petitioner *never* waived the issue of whether Respondents' activities satisfied the jurisdictional nexus requirement in the "direct effect" clause, nor could he. As Respondents acknowledge, the Eleventh Circuit's decision hinged on whether "Peru's activities fell within any of the three clauses of FSIA's [sic] commercial activity exception, including the direct effect clause." Resp. at 11. Indeed, the Eleventh Circuit identified its task as "consider[ing] the evidence that bears on § 1605(a)(2)'s three jurisdictional nexuses." Pet. App.[3] at 20a. The court thereafter evaluated the evidence Petitioner put forth in support of his argument that Respondents' conduct caused a "direct effect" in the United States. *See id.* at 25a-26a. The issue Petitioner presents to this Court therefore has

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[3] "Pet. App. at ___" refers to the Appendix submitted in support of the Petition for Writ of Certiorari. "Resp. App. at ___" refers to the Appendix Respondents submitted in support of their brief in opposition.

not been waived. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (noting that the principle of waiver "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue").

3. The Eleventh Circuit's decision here clearly conflicts with the decisions of other circuits. In rejecting Petitioner's arguments below, the Eleventh Circuit held that Respondents' conduct did not create "*significant* financial consequences in the United States" as required by the court's pre-*Weltover* decision in *Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982). Pet. App. at 26a (emphasis added). In *Harris Corp.*, the Eleventh Circuit framed the "direct effect" issue by asking whether the foreign sovereign's conduct was "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case." 691 F.2d at 1351 (quoting *Texas Trading and Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981)). The court held that Section 1605(a)(2)'s "direct effect" clause was satisfied because the sovereign defendant's conduct resulted in "*significant*, *foreseeable* financial consequences here." *Id.* (emphasis added).

Beyond running counter to this Court's instruction in *Weltover* that a direct effect need not be "substantial" or "foreseeable," *see Weltover*, 504 U.S. at 618, the Eleventh Circuit's decision here and in *Harris Corp.* is on all fours with the Second and Ninth Circuits' judicially created "legally significant act" test. The "legally significant act" test, as formulated by the Second Circuit, "requires that the conduct having a direct effect in the United States be legally significant

conduct in order for the commercial activity exception to apply." *See Filatech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998).

The Eleventh Circuit here went much further, however, and likened the "direct effect" clause to the contacts necessary for a court to exercise personal jurisdiction over a non-resident defendant. *See* Pet. App. at 25a. To satisfy the due process requirements under a personal jurisdiction analysis, according to the Eleventh Circuit, a defendant's contacts with the forum state must meet three considerations:

> (1) purposeful availment of the forum state; (2) the cause of action arises out of the activities of which [a defendant] purposefully availed [itself], i.e., the contacts must proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum state; and (3) reasonable foreseeability that a defendant should reasonably anticipate being haled into court there.

*Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1250-51 (11th Cir. 2000) (internal citation and quotation omitted, emphasis in original).[4] The Eleventh Circuit thus goes above and beyond the Second Circuit's formulation of the "legally significant act" test to require that a foreign sovereign defendant must possess extensive contacts within the United States to satisfy the "direct effect" effect clause.

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[4] Notably, the Eleventh Circuit cited to *Future Tech.* in holding that Petitioner failed to present evidence sufficient to satisfy the "direct effect" clause. *See* Pet. App. at 25a.

Respondents stress that the reward offer, Emergency Decree 049-2001, did not mandate payment of the reward in the United States.[5] Resp. at 15a-16a. Respondents argue that as a result, there was no "direct effect" felt in the United States. *See id.* The Fifth Circuit rejected this same argument in *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998). There, the court interpreted *Weltover* to signify that a foreign sovereign defendant's failure to make a contractually obligated payment in the United States could result in a "direct effect" sufficient to invoke jurisdiction. *See Voest-Alpine*, 142 F.3d at 894. But the court went on to explain that "*Weltover*'s reliance on a legally significant act in the United States does not justify, much less compel, the conclusion that it is or should be some kind of threshold requirement under the third clause." *Id.* The *Voest-Alpine* court thus concluded that the test of whether the "direct effect" clause is satisfied turns not on "arcane doctrines" such as place of payment, but instead focuses on whether the foreign sovereign defendant's activities, as a whole, created effects which were felt in the United States. *Id.* at 895.

Petitioner meets the Fifth Circuit's test under the "direct effect" clause here, even under Respondents' skewed view of the facts. To be sure, it is undisputed that Petitioner was located in Miami at the time Respondents conveyed the reward offer to him; that Petitioner made the key telephone call to his cohorts

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[5] Respondents, of course, conveniently omit that Emergency Decree 049-2001 did not require payment to be made in Peru, either. In other words, the reward offer is *silent* as to the place of payment.

from Miami which resulted in Montesinos' arrest;[6] and that Respondents denied Petitioner's claim for the $5 million reward while Petitioner was in Miami.

Respondents also ignore Petitioner's argument, and the district court's conclusion, that the reward offer constituted a unilateral contract. *See* Pet. at 7. In other words, the contract at issue here was negotiated, consummated, and breached *in Miami*. Petitioner therefore satisfied the "direct effect" clause as interpreted by the circuits rejecting the "legally significant act" test: Petitioner suffered a non-trivial financial loss as an immediate consequence of Respondents' conduct. *See, e.g., DRFP L.L.C. v. Republica Bolivariana de Venezuela*, Nos. 09-3424, 09-3725, 2010 WL 3781287, *4 (6th Cir. Sept. 23, 2010) (contract's silence as to place of payment held not dispositive in "direct effect" analysis); *Voest-Alpine*, 142 F.3d at 896 ("direct effect" clause satisfied where U.S.-based plaintiff suffered a non-trivial financial loss as a result of the foreign sovereign defendant's conduct).

4. The public policy considerations at issue here favor this Court granting the Petition. Respondents' attempt to dismiss the undeniable policy concerns at

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[6] Respondents' attempt to characterize these significant acts as mere law enforcement activity which cannot serve as a basis for satisfying the FSIA's commercial activity exception is unavailing. Resp. at 14 (citing *Saudia Arabia v. Nelson*, 507 U.S. 349, 362 (1993)). As the Eleventh Circuit noted in *Guevara I*, "the oldest American decision recognizing a commercial activities exception to sovereign immunity involved a reward for capture." Pet. App. at 67a (citing *The Bellona*, 8 F. Cas. 559 (D.C.S.C. 1798) (No. 4,407).

play by arguing that the United States urged the Eleventh Circuit to dismiss this case on international comity and act of state grounds. Resp. at 19-21. First, the Eleventh Circuit in *Guevara I* took pains to emphasize how requiring Respondents to honor their bargain is critical to not only Peru's national security interests, "but those of every country that offers rewards for information, including this country." Pet. App. at 72a-73a. Those same concerns remain of equal, if not greater, force today.

Second, Respondents do little to demonstrate that the "gap" Petitioner exposed between the opposing views taken by the State Department and the FBI with respect to Petitioner's claim for the reward is "illusory." Resp. at 20. There is a marked difference between the FBI *objecting* to Special Agent Currier testifying at trial, and the FBI *disavowing* Agent Currier's statements altogether. Here, the FBI merely objected to Agent Currier testifying because it believed that his testimony would disclose confidential investigatory techniques and procedures. Resp. App. at 16a. The FBI's objection in no way, however, "disavowed" Special Agent Currier's prior requests on two separate occasions for Respondents to honor their obligation. Pet. App. at 80a-83a. The "gap" Petitioner highlighted is therefore anything but "illusory" as Respondents maintain.

Third, Respondents cannot be heard to complain that the district court failed to dismiss Petitioner's case on international comity and act of state grounds, because Respondents never raised an abstention-based defense before the district court; a fact not lost upon the United States. *See* Resp. App. at 50a. If anything, Respondents *invited* the district court to evaluate

whether the Special High Level Committee's decision to deny Petitioner's claim was reasonable. *See* DE-166, p. 7.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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